IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-6624

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HUMBERTO ROSALES-LOPEZ,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY

Because of statements raised for the first time in the brief for the United States in opposition to the petition for writ of certiorari, this reply is filed.

REASONS FOR GRANTING THE WRIT

I. The inadequate voir dire by the trial court refusing to ask a question concerning race when a Mexican was charged with an immigration offense is a clear break with established precedent for the federal courts.

The Petitioner, a Mexican,[1/] was on trial for

1/ Although the Brief in Opposition (p. 3) freely refers to the Petitioner as a "resident alien of Mexican descent," he has since been deported to Mexico after being paroled. The Petitioner still faces the suspended 30-year sentence which gives this Court continuing jurisdiction. United States v. Campos-Serrano, 404 U.S. 293 (1971).

smuggling aliens from Mexico. The Government characterized the trial without racial or ethnic overtones:

> The instant case, on the other hand, involved a victimless crime, and there is no evidence that the trial was charged with any racial or ethnic overtones.

[Brief in Opposition 4]

During voir dire examination on the question of whether the jurors "had any feelings about the alien problem," two jurors expressed reservations and were summarily excused [R.T. 146-147]. That feeling may have been generated towards the persons transported rather than the Petitioner (the alleged smuggler) and may have been connected with racial or ethnic considerations. The extremely truncated voir dire produced an explosive response on this touchy issue which should have triggered the court's inquiry as to this important question stressed in the original written voir dire questions and again specifically asked for by trial defense counsel.[2/]

Although the Petitioner would contend that the nature of the case itself triggers an inquiry into racial, ethnic, or other discriminatory attitude towards a person of Mexican descent, other circumstances of the case also required this inquiry. The chief prosecution witness, a co-defendant, Virginia Bowling, was white Anglo. Her daughter was in love with the Petitioner and as a result the Petitioner started living in Virginia Bowling's home approximately six months before the alien smuggling incident. [R.T. 360] That relationship could have aggravated any latent racial antagonism of a juror

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2/ The denial of personal voir dire and the hurried, brief voir dire conducted solely by the judge is the type of voir dire that should be critically evaluated by this Court as a fair implementation of the original intent and purpose of Rule 24(a), Federal Rules of Criminal Procedure. Not only is there an abuse of Rule 24(a) that should be addressed by this Court, but in the context of a denial of an explicit demand for an inquiry concerning race or color deserves consideration by this Court.

against the Petitioner.[3]

The Government's contention that Mexican ancestry is distinguishable from being a member of a minority race [Brief in Opposition 5] is not a distinction recognized by this Court. In Hernandez v. Texas, 347 U.S. 475 (1954), Texas had attempted to state there were two racial classes--white and Negro--within the contemplation of the Fourteenth Amendment. This Court made it clear that discrimination on the basis of race or color, including delineation as to Mexican descent, was protected under federal law. See also Castaneda v. Partida, 430 U.S. 482 (1977). It is too late to say this Court would permit discrimination on the basis of Mexican descent but not on the basis of race. The thrust of the opinion in Ristaino v. Ross, 424 U.S. 589 (1976), in the context of federal courts indicated that voir dire questioning should be able to probe for this fundamental prejudice.

To deny review in this case is to manifest that there are no minimum standards or requirements for voir dire questioning in a federal criminal case.[4]

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[3] Petitioner was living with Bowling's 19-and-one-half-year-old daughter in Bowling's house with food and other subsistence provided by Bowling [R.T. 408]. Bowling referred to her daughter as a "junkie" (heroin user). When Virginia Bowling was asked if her daughter had run any illegal aliens, she answered, "You will have to ask her about that." [R.T. 410]

[4] Rhetorical inquiry in this case was no voir dire at all. In the "Chicago Seven Conspiracy Trial," United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), the court stated:

> The government's position must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices. Thus it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause. 472 F.2d at 367.

II. The judge who presided at a complex alien smuggling jury trial and sentenced a co-defendant declined to sentence the defendant as requested for the convenience of the probation office, and over objection the substitution of a different judge who had not read the trial transcript for sentencing was serious error.

The Government contends that the sentencing judge, who did not hear the evidence at the jury trial in which two co-defendants testified, one of whom was later sentenced by the trial judge, was familiar with the case even though, unlike the court of appeals, he did not review the transcript of the trial [Brief in Opposition 7 n.3]. That claim is buttressed by the fact that the judge suspended all except 18 months of the sentence of imprisonment even though a sentence of 35 years imprisonment may have been imposed. The federal prosecutor recommended 18 months (confinement) as an adult [Sentencing Transcript F-G].[5/] The sentencing judge then added the suspended term of 30 years in addition to the 18 months recommended by the prosecution [Sentencing Transcript G]. The fashioning of a sentence that conforms to the one recommended by the prosecution does not manifest of itself familiarity with the case but rather reliance upon a prosecutorial formulation of the worth of the case or the appropriate sanction. If anything, it indicates an abdication of judicial discretion. This sentencing was not a careful evaluation of the roles of the other defendants, but much like the decision in United States v. Bowser, 497 F.2d 1017 (4th Cir. 1974), required resentencing because the judge was not familiar with the facts and circumstances of the case.

Appellate courts give sometimes undue deference to the decisions of juries because they have evaluated the

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5/ The probation department had recommended two years.

demeanor of witnesses. At this critical stage of sentencing a second judge who has not observed the demeanor of witnesses and two co-defendants and has not reviewed the cold transcript of their testimony, is unable to substitute for the trial judge by sole reliance on a short pretrial motion hearing and a limited presentence report.

In this case it was possible for the trial judge to have sentenced Petitioner by simply requesting an expedited presentence report as requested by the defense. Although there would be some inconvenience to the federal judicial system to achieve the sentencing by the trial judge, failure to do so because of the inconvenience demonstrated by this record, deserves the review of this Court so as to provide some standards for substitution of different judges at sentencing.

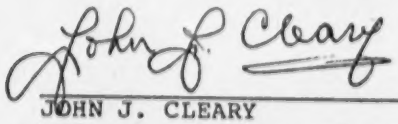
The federal judiciary has two separate policies for the use of visiting judges. One, for such transfers intra-circuit and another for inter-circuit. This case questions those policies which should be reviewed by this Court. A policy which favored intra-circuit transfers of judges might have alleviated the problem created in this case.

CONCLUSION

If the Petitioner had been convicted in a state court, the request for relief from this Court may not be warranted. However, the issues framed in the context of a federal criminal case of both a constitutional and supervisory responsibility merit review and consideration by this Court. For the reasons set forth in the original petition for writ of certiorari as well as those set forth in this reply, it is urged that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit and that this Court either summarily reverse or set the case down for oral argument and further consideration.

Respectfully submitted,

DATED: 31 July 1980



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